IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5669 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GOPAL GLASS WORKS PRIVATE LTD

Versus

COMMISSIONER OF INCOME TAX-1

Appearance:

MR SN SOPARKAR for Petitioner

MR AKIL KURESHI WITH MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE C.K.BUCH

Date of decision: 22/02/2000

ORAL JUDGEMENT (Per J.N.Bhatt, J.)

In this petition, under Article 226 of the Constitution

of India, the petitioner company has raised challenge against the order dated 29.7.92, passed by the respondent, under section 264(1) of the Income Tax Act, 1961 (IT Act), whereby, the revision petition, which pertained to the assessment year 1989-90, came to be dismissed.

In esse, the factual matrix is not much in controversy. The question which has come up for determination and adjudication in this petition under Article 226 of the Constitution is whether, the exercise of statutory, discretionary power by the respondent in not entertaining the revision is justified or not ?

Firstly, it is contended that the exercise of discretion by the respondent in dismissing the revision is not legal as the action of closing or treating the income return as invalid was not exercised reasonably and justly depriving the petitioner-assessee from his right to have return assessed on merits. Alternatively, it was submitted that the return could not have been treated as invalid in view of the instruction No.1348 dated 30.8.80 issued by the Central Board of Direct Taxes (CBDT). In support of the alternative contention, reliance is also placed on the case law, to which reference, will be made by us, hereinafter, at an appropriate stage.

The assessee filed revision petition, on 6.3.91, against the order of Deputy Commissioner of Income-tax, Ahmedabad dated 5.3.90, treating the return of income for the assessment year 1989-90 filed by the assessee, on 28.12.89, as invalid return, exercising powers under section 139(9) of the IT Act.

It would be expedient, at this stage, to refer to the relevant provisions of section 139 of the IT Act, provided in Chapter XIV, prescribing procedure for assessment and in relation to return of income.

"139. (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as maybe prescribed:

Provided that a person, not furnishing return

under this sub-section and residing in such area as may be specified by the Board in this behalf by a notification in the Official Gazette, and who at any time during the previous year fulfils any one of the following conditions, namely

(i) is in occupation of an immovable property exceeding a specified floor area, whether by way of ownership, tenancy or otherwise, as may be specified by the Board in this behalf; or

(ii) is the owner or the lessee of a motor vehicle; or

(iii) is a subscriber to a telephone; or

(iv) has incurred expenditure for himself or any other person on travel to any foreign country;

(v) is the holder of the credit card, not being an "add-on" card, issued by any bank or institution; or

(vi) is a member of a club where entrance fee charged is twenty-five thousand rupees or more;

Provided further that the Central Government may, by notification in the Official Gazette, specify class or classes of persons to whom the provisions of the first proviso shall not apply,

shall furnish a return, of his income during the previous year, on or before the due date in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

Explanation 1. In this sub-section, "due date: means;

(a) where the assessee is a company the 30th day of November of the assessment year;

(b) where the assessee is a person, other than a company--

(i) in a case where the accounts of the assessee are required under this Act or

any other law to be audited or where the report of an accountant is required to be furnished under section 80HHC or section 80HHD or where the prescribed certificate is required to be furnished under section 80R or section 80RR or sub-section (1) of section 80RRA, or in the case of a co-operative society or in the case of a working partner of a firm whose accounts are required under this Act or any other law to be audited, the 31st day of October of the assessment year;

(ii) in a case where the total income referred to in this sub-section includes any income from business or profession, not being a case falling under sub-clause (i) the 31st day of August of the assessment year;

(iii) in any other case, the 30th day of June of the assessment year.

Explanation 2 -- For the purposes of sub-clause (i) of clause (b) of Explanation 1, the expression "working partner" shall have the meaning assigned to it in Explanation 4 of clause (b) of section 40.

Explanation 3 -- For the purposes of this sub-section, the expression "motor vehicle" shall have the meaning assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988)

Explanation 4 -- For the purposes of this sub-section, the expression "travel to any foreign country" does not include travel to the neighbouring countries or to such places of pilgrimage as the Board may specify in this behalf by notification in the Official Gazette.

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"(9) Where the Assessing Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify

the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing Officer may, in his discretion, allow; and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Act, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return:

Provided that where the assessee rectifies the defect after the expiry of the said period of fifteen days or the further period allowed, but before the assessment is made, the Assessing Officer may condone the delay and treat the return as a valid return.

Explanation -- For the purposes of this sub-section, a return of income shall be regarded as defective unless all the following conditions are fulfilled, namely

(a) the annexures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income have been duly filled in;

(b) the return is accompanied by a statement showing the computation of the tax payable on the basis of the return;

(bb) the return is accompanied by the report of the audit referred to in section 44AB, or where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report;

(c) the return is accompanied by proof of --

(i) the tax, if any, claimed to have been deducted at source and the advance tax and tax on self-assessment, if any, claimed to have been paid;

(ii) the amount of compulsory deposit, if

any, claimed to have been made under the Compulsory Deposit Scheme (Income-tax Payers) At, 1974 (38 of 1974);

(d) where regular books of account are maintained by the assessee, the return is accompanied by copies of --

(i) manufacturing account, trading account, profit and loss account or, as the case may be, income and expenditure account or any other similar account and balance sheet;

(ii) in the case of a proprietary business or profession, the personal account of the proprietor; in case of a firm, asociation of persons or body of individuals, personal accounts of the partners or members; and in the case of a partner or member of a firm, association of persons or body of individuals, also his personal account in the firm, association of persons or body of individuals;

(e) where the accounts of the assessee have been audited, the return is accompanied by copies of the audited profit and loss account and balance sheet and the auditor's report and where an audit of cost accounts of the assessee has been conducted, under section 233B of the Companies Act, 1956 (1 of 1956), also the report under that section;

(f) where regular books of account are not maintained by the assessee, the return is accompanied by a statement indicating the amounts of turnover or, as the case may be, gross receipts, gross profit, expenses and net profit of the business or profession and the basis on which such amounts have been computed, and also disclosing the amounts of total sundry debtors, sundry creditors, stock-in-trade and cash balance as at the end of the previous year."

The exercise of power by the Assessing Officer under sub-section (9) of section 139, in relation to the assessment year 1989-90, was sought to be revised and, therefore, revision was filed under section 264(1) of the IT Act. The respondent after hearing and considering the facts and circumstances, dismissed the revision, confirming the view of the Assessing Officer, and holding that, in the facts and circumstances of the case, the assessee has no case on merits and the order of the Assessing Officer was justified. The assessee has, therefore, questioned the order rejecting the revision, dated 29.7.92, by the respondent, by invoking the extra-ordinary, equitable, plenary, discretionary, writ jurisdiction under Article 226 of the Constitution of India, wherein, obviously, the jurisdictional sweep is very much circumscribed.

Before we evaluate and examine the aforesaid two contentions, let us have, a look into the relevant and material facts, which have, practically, remained uncontroverted. Following facts are therefore, highlighted:

(1) Assessee's previous year had ended on 31st March, 1989.

(2) He filed return of income on 28.12.89, accompanied by the audited accounts as on 30.6.88 and also provisional accounts as on 31st March, 1989.

(3) The return was, therefore, found defective and deficient in particulars prescribed by the Assessing Officer. He, therefore, exercising his discretion, in favour of the assessee, called upon it to remove the deficiencies within a spell of 15 days by a notice dated 12.1.90, which came to be served on the assessee on 23.1.90.

(4) Instead of removing the deficiencies, called upon by the respondent, in a notice, the Assessee company by writing letter dated 9.2.90, which came to be received by the Assessing Officer on 12.2.90, inter alia, replied that:

"With reference to the above, we kindly submit to your goodself that the finalised copy of the Balance sheet and Profit and Loss Account as on 31st March, 1989 together with tax audit details has been submitted to our Auditors and we are

awaiting their report. Kindly bare with us."

(5) It is, therefore, evidently, seen that no specific request for extension of time was sought and, therefore, in this context, the expression used in the letter "kindly bare with us" were hotly debated by both the sides.

(6) The Assessing Officer by passing an order on 5.3.90, declined the return of the income of the assessee as invalid as the defects pointed out in the notice remained uncomplied with.

(7) The Assessee Company contended that the statutory audit reports could not be complied with and further details of annexures, also, could not be supplied since Auditors could not complete the tax audit work and again they were at Bombay.

(8) The assessee also raised a plea that oral assurance for minimum period of one month to file tax audit report was granted by the Assessing Officer. It was, therefore, the case of the Assessee that time came to be granted upto 31.3.90, in support of which, affidavit of the Accountant one Mr Lalit Amrutlal Khatri was also filed. The order of the Assessing Officer dated 5.3.90, was sought to be revised, invoking the provisions of section 264(1) of the Act, unsuccessfully.

(9) Return of the income of the assessment year 1989-90, thus, had not been filed by the Assessee Company with the balance sheet and Profit and Loss Account, duly audited by the Auditors; and also the tax auditor report under section 44AB as required by the explanation of sub-section 9 of section 139 of the IT Act.

The respondent, upon evaluation of facts and circumstances and the relevant proposition of law, dismissed, the revision application on 29.7.92 and confirmed the order of the Assessing Officer and, inter alia, held that:

(1) The Assessee Company had not asked for time for filing return of income by its letter dated 9.2.90.

(2) The Assessee nor anyone on its behalf had orally made any request for extension of time upto

31.3.90 for filing audit reports.

(3) No such request was ever made on behalf of the assessee Company to the Assessing Officer, orally.

(4) The affidavit filed on behalf of the Assessee Company by one Mr Khatri was found by the respondent as an afterthought. He held that the letter dated 9.2.90 received by the Department was not personally given to the Assessing officer.

(5) No such note was also found in the record by the respondent about the oral request allegedly made by Mr Khatri on behalf of the assessee to the Assessing Officer, personally.

(6) Upon close verification of the tax audit report allegedly filed with the letter dated 12.3.90, it is revealed that the reports in form No.3-CA and 3-CD did not bear the signature of the Chartered Accountants.

(7) The provisional accounts submitted with the return of income were as on 31.3.89 and till the date of the impugned order, no final accounts duly audited by the Chartered Accountants has been filed by the assessee Company. It was, therefore, found by the respondent that there was no case for condoning the delay in submitting the requisite statutory reports.

From the aforesaid discussions and the record of the present case it is explicit and evident that the Assessee Company failed to submit the Profit and Loss Account duly audited by the Chartered Accountants. The Assessee Company had also failed to produce the tax audited report as mandated by section 44-AB of the IT Act. There is no any manner of doubt that the return of income filed by the assessee for the relevant assessment year was not accompanied by the aforesaid statutory report which was sought to be tendered in the revision was, admittedly, unsigned. The Assessing Officer, therefore, found that the return of income was deficient and defective and not in compliance with the relevant provisions. However, the Assessing Officer, exercising his discretion, under section 139(9) of the IT Act served the assessee with a notice to cure the defects. Such an opportunity was, admittedly, given to the assessee to rectify the defect. As provided in sub-section (9) of section 139,

rectification of defect is required to be made within a period of 15 days from the date of such intimation or within such further period which, on application being made in that behalf, the Assessing Officer, may in his discretion allow and if the defect is not rectified within the said period of 15 days or the extended period, then, notwithstanding anything contained in any other provisions of the IT Act, the return shall be treated as an invalid return and the provisions of IT Act shall apply as if the assessee had failed to furnish the return. As observed hereinbefore, the assessee did not rectify the defects, as pointed out by the Assessing Officer within the statutory period and had only sent a letter without specific request for extension of time. The Assessing Officer, passed order, under section 139(9) of the IT Act, holding the return as invalid.

The assessee company had raised three grounds for non-compliance of the defects intimated by the Assessing Officer.

(1) That there was legal battle between the Directors of the Assessee Company, inter-se.

(2) That the Chartered Accountants and Auditors were at Bombay.

(3) That the oral request made by Mr Khatri to file the tax audited reports within a period of one month came to be accepted by the Assessing Officer and, thereby, time came to be extended upto 31.3.90.

The aforesaid three grounds were not accepted by the Assessing Officer as well as the respondent while passing the impugned order in the revision. No doubt, the delay in rectifying the defects could be condoned if the circumstances so justified, by exercising the discretion by the authority. The aforesaid grounds were not found favour with the respondent. He confirmed the order of the Assessing Officer dated 5.3.90, whereby the return of income for the assessment year 1980-90 filed by the assessee came to be held and treated as an invalid return under section 139(9) of the IT Act. Nothing has been, successfully, pointed out in course of the marathon submissions made before us, on behalf of the petitioner assessee, that the impugned order dated 29.7.92 passed by the respondent, exercising his powers, under section 264(1) and also by the Assessing Officer, in his order dated 5.3.90, exercising his powers under section 139(9) of the IT Act is, in any way, tainted with any vice which

would warrant interference by this Court with the impugned orders passed by the respondent in the Revision. Needless to reiterate the limited parameters and the circumscribed jurisdictional zone of a writ under Article 226 of the Constitution. It cannot be gainsaid that it is not the quality of the decision which could be challenged under Article 226 of the Constitution of India. The decision making process itself, if found, vitiated by any extraneous consideration or any perversity or non-application of mind to vital and relevant facts, the very expression, discretion, ipso facto means formation of perception and if such perception is taken in the factual scenario upon its evaluation and assessment, it cannot be, ipso facto, challenged under Article 226 of the Constitution. This Court is not sitting in appeal against the decision of the respondent in revision. Nothing has been, otherwise, also, noticed by us which would even, remotely, warrant, interference of this Court. Nothing has been spelt out for the exercise of discretion by the Assessing Officer under section 139(9) of the IT Act and the exercise of discretionary power under section 264(1) of the respondent is in any way influenced by extraneous or hostile consideration. On the contrary, the Revenue could, successfully, show to us that the Assessing Officer as well as the Revisional Authority, exercised their discretion rightly, justly and reasonably in the light of the facts and circumstances of the case and in view of the provisions of section 139(9) of the IT Act. Therefore, in our opinion, the first contention advanced before us is meritless and is required to be rejected.

Obviously, therefore, it would take us, now, to the appreciation of the second contention on merits. In this connection, reliance is placed on Instruction No.1348 of CBDT dated 30.8.80. We have been taken through the aforesaid instruction. Since, strong reliance is placed on this instruction, it would be appropriate and expedient at this stage, to refer to it, relevant portion of which reads as under:

> "Section 139(9) envisages the issue of a deficiency letter if it is considered that a return of income is defective. The Explanation lists the defects. The first defect mentioned is that the enclosures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income have not been duly filled in. A return of income shall not be considered as defective under

this clause merely because the inapplicable columns have not been filled up or against applicable columns the assessee has indicated that information as per statement is attached and the attached statement gives the relevant information. Again clause (e) of the Explanation requires that where the accounts of the assessee have been audited, the return should be accompanied by copies of the audited profit and loss account, balance sheet and the auditor's report. The omission to enclose copies of the audited profit and loss account, balance-sheet and the auditor's report should be treated as a defect in all cases, requiring statutory audit. If the return indicates that the audit has not been completed and hence audited accounts and auditor's report could not be enclosed, the return should not be treated as defective."

It could very well be visualised from the plain perusal of the aforesaid instruction of the CBDT that it pertains to only clauses (a) and (e) of the explanation to sub-section (9) of section 139. It is as such not relatable or attributable to other clauses under explanation to sub-section (9) of section 139. We have also no hesitation in finding and accepting the contention that clause (bb) and clause (d) under explanation to sub-section (9) of section 139 are not covered by the said instructions. Since the Board's instructions are not applicable to the provisions of clause (bb) and (d), it would not detain us any further in rejecting the second contention also. Since CBDT instruction No.1348 are not at all attracted to the facts and circumstances of the present case, it would not be necessary for us to divulge, meticulously, as to what is the status, interpretation and legal efficacy of the Board Instructions. The decisions relied on by the learned counsel for the assessee Company to substantiate the plea that the instructions of the Board are binding to the Department would not, at this stage, assume any further survival value.

It would be very material to note, at this juncture, that the said instruction of the CBDT came to be issued on 30.8.80. Clause (bb) as it originally stood came to be introduced with effect from 1.4.89 and the subsequent amendment which was introduced brought into effect from 1.7.95 and the effect of instruction upon the said provision also is not required to be undergone since the very basis of the second contention revolving around and referable to only clause (a) and (e) of sub-section (9)

of section 139. The instructions, in our opinion, as we have stated hereinbefore, do not refer to clauses (bb) and (d) of the explanation to sub-section (9) of section 139 of the IT Act and therefore not applicable.

After having given our anxious consideration and thoughts to the factual scenario emerging from the record of the present case, coupled with the relevant proposition of law and, in particular, the material provisions of section 139(9)(bb) and the exercise of discretionary power by the respondent under section 264(1) of the IT Act, we are of the, clear, opinion that the contentions propounded by the Assessee Company before the Assessing Officer as well as the Revisional Authority are, rightly, not upheld. It cannot be said, by any stretch of imagination, that the exercise of discretionary power by the authorities below is in any way influenced or affected by extraneous considerations or non-consideration of vital facts. Therefore, we find that this petition under Article 226 of the Constitution of India is without any substance and deserves only and only fate of rejection. Accordingly, it is rejected. Rule discharged. In the facts and circumstances, parties are directed to bear their own costs.

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